SUPREME COURT, U. S.

Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

No. 71-731

FRED THOMAS, SHERIFF, D. C. YEARWOOD, DEPUTY SHERIFF, and UNITED STATES FIDELITY AND GUARANTY COMPANY,
Petitioners,

vs.

E. E. MORGAN,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY BRIEF OF PETITIONERS

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Pursuant to Rule 24, Petitioners submit the following reply to the arguments first raised in the Brief in Opposition:

I.

The Decision of the Fifth Circuit Conflicts in Principle with Prior Decisions of This Court and Is in Direct Conflict with Two Decisions of the Mississippi Supreme Court on an Important Question of Federal Law. Under Any View of This Case, It Presents Significant Questions of Public Importance That Should Be Decided by This Court.

Many of Respondent's arguments erroneously characterize the present case as one involving the purely "private interests" of the parties, and constitute an obvious effort to persuade this Court that the issues involved are not of national concern or of sufficient public importance to merit review by this Court. These arguments of Respondent are strikingly at variance with the arguments that Respondent himself advanced in his two prior petitions for certiorari in this same controversy (No. 491, October Term, 1969, and No. 70-344, October Term, 1971).

In both of those petitions, Respondent Morgan repeatedly and vigorously asserted that this case involves "federal questions of substance not heretofore determined by this Court"; that the question of waiver by prior voluntary contract is "especially critical to the public interest"; and that this case presents a question "in the broad national interest."*

For the reasons set forth in the present petition (pp. 19-40), and the reasons hereinafter briefly discussed, Petitioners earnestly submit that the present case involves questions of widespread public importance, that the substantiality of the questions presented is beyond doubt, and that the need for plenary review of the decision below is indisputable.

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*Petition in No. 491, October Term, 1969, pp. 4, 6; Petition in No. 70-344, October Term, 1971, pp. 3, 5.

The basic facts of this case clearly demonstrate that this case involves significant and far-reaching federal issues. These facts may be simply stated.

In order to induce USF&G to become his surety on performance and payment bonds for many millions of dollars, Respondent Morgan voluntarily represented and promised that his extensive assets were bound and would remain available for the complete protection and indemnification of USF&G. Morgan also expressly agreed to furnish financial statements to USF&G upon request. USF&G, as surety, has suffered millions of dollars in losses as a result of its reliance on Morgan's representations and voluntary contractual agreements.

Under these facts, the Mississippi Supreme Court has twice held that Morgan is bound to specifically perform his contractual obligations to USF&G, and that Morgan, by the effect of his own voluntary acts and contracts, is barred and precluded from invoking the privilege against self-incrimination as an excuse for refusing to disclose his assets to USF&G (Pet. pp. 2, 12-13, 15).

In so holding, the Mississippi Court has held that the privilege may be waived (and estoppel created) by a prior voluntary contract to furnish financial information, citing specifically *Zap* v. *United States*, 328 U.S. 624 (1946), and § 2275 of *Wigmore on Evidence* (Pet. App. C, pp. A95-A97).* The District Court has explicitly agreed with this holding (Pet. App. B, pp. A73-A75, A67-A68).

The Fifth Circuit, on the other hand, has held that the privilege may not be relinquished by a prior voluntary

*As shown in the Petition (pp. 29-30), the rule announced by Dean Wigmore is firmly supported by precedent and by the history, purpose, and policies of the privilege. Likewise, a recent text on constitutional law cites *Zap* v. *United States* as specifically holding that the privilege against self-incrimination may be waived by a prior voluntary contract (Pet. p. 31).

contract to furnish information, asserting that *Zap* v. *United States* does not so hold (Pet. App. A, pp. A15-A16), and that § 2275 of *Wigmore* does not correctly state the law (Pet. App. A, pp. A11-A15).

Thus, the conflict between the Mississippi Supreme Court and the Fifth Circuit is clearly defined. If, as held by the Mississippi Court, *Zap* holds that the Fifth Amendment privilege may be waived by a prior voluntary contract to furnish information, then the decision of the Mississippi Supreme Court is right, and the decision of the Fifth Circuit is not only wrong, but it also conflicts with a prior decision of this Court.

On the other hand, if, as held by the Fifth Circuit, *Zap* does not resolve the question whether the Fifth Amendment privilege may be waived by a prior voluntary contract, then the Fifth Circuit has decided a highly important question of federal law which has not been, but should be, settled by this Court. This is especially true since the decision of the Fifth Circuit is in direct conflict with two decisions of the Mississippi Supreme Court on this identical question of federal law.

Petitioners respectfully submit, therefore, that under any view of this case, review by certiorari is eminently appropriate.

If, as Petitioners contend, the decision of the Fifth Circuit conflicts with a prior decision of this Court, that is one of the strongest possible grounds for a grant of certiorari.

Even if it be assumed that the Fifth Circuit decision does not conflict with *Zap*, it is inescapably clear that the Fifth Circuit's decision is in direct conflict with two decisions of the Mississippi Supreme Court on a question of federal law that is of vital importance to the State of Mis-

sissippi and the public interest that it represents, as well as numerous other States and private litigants.

This conflict fully justifies a grant of certiorari. The applicable principle is firmly established by the decisions of this Court, and is summerized as follows in a leading text:

> "Another valid reason for the granting of certiorari by the Supreme Court is the presence of a direct conflict between the decision of a court of appeals and that of the highest court of a state, where that conflict concerns federal questions. Such a conflict will warrant review of either of the conflicting decisions, since the Supreme Court is the final arbiter of matters of federal law decided by either federal or state courts. Hence a conflict between such courts concerning the construction and application of the federal Constitution, or the validity, construction, or application of federal statutes or treaties, or any right, title, privilege, or immunity thereunder, will support a petition for a writ of certiorari." *Stern & Gressman, Supreme Court Practice* (4th Ed. 1969), § 4.9, p. 163.
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> "A conflict between decisions of a highest state court and a federal court of appeals on a question of federal law is ground for granting review of either decision." *Stern & Gressman, supra*, § 4.27, p. 192.

The Mississippi Supreme Court has stated in no uncertain language that the State of Mississippi has a vital governmental interest in the enforcement of its judicial decrees (Pet. App. B, p. A76). In actual, practical effect, the Fifth Circuit decision destroys the enforceability of

free and voluntary contracts and seriously impairs the fair administration of civil justice. Consequently, it is vital that the questions presented be decided by this Court.

II.

Under the Prior Decisions of This Court, the Federal Courts Should Permit Enforcement of the State Court Decree by Affording a Judicially Established Use Immunity in Regard to the Information Required by That Decree.

Another vitally important question is whether the Federal Courts should permit enforcement of the State court decree by adjudicating that Morgan must furnish the information required by that decree, but he shall not be subject to any criminal proceeding based upon the information disclosed or its fruits.

This question has two related aspects: (1) Whether "use immunity" (as distinguished from complete immunity from prosecution) is constitutionally sufficient, and (2) whether the Federal Courts are empowered to afford such use immunity by adjudicating that the State is prohibited from making any use of the compelled information and its fruits in connection with a criminal proceeding against Morgan.

These questions are brought into focus by two 1964 decisions of this Court that were decided on the same day. *Malloy* v. *Hogan*, 378 U.S. 1, and *Murphy* v. *Waterfront Commission of New York*, 378 U.S. 52.

In *Malloy* v. *Hogan*, this Court held for the first time that the Fifth Amendment privilege was made binding on the states by the Fourteenth Amendment.

Analysis of *Murphy* requires slightly more discussion. Prior to that case, this Court had held that the Fifth Amendment privilege did not protect a state witness against in-

crimination under federal law. Murphy was held in contempt by the New Jersey court for refusing to answer questions at a hearing. He had been granted immunity from prosecution by New Jersey, but still refused to answer on the ground that he might incriminate himself under federal law. On the basis of the prior decisions of this Court, the New Jersey court held that the contempt judgment was valid.

On appeal, this Court overruled its prior decisions to the contrary, and held that the privilege protects a state witness against incrimination under federal as well as state law. 378 U.S. at 77-78. However, this Court further held that New Jersey could compel Murphy to answer the questions propounded. This Court reached this result by affording a judicially established use immunity and adjudicating that the Federal Government would be prohibited from making any "use of the compelled testimony and its fruits" in connection with a criminal prosecution against Murphy. 378 U.S. at 79.

Petitioners submit, therefore, that *Murphy* clearly establishes that use immunity of the type afforded in *Murphy* fully satisfies all constitutional requirements.

Since this Court's decision in *Murphy*, several courts have held that complete immunity from prosecution is not required, but use immunity is sufficient. (Pet. pp. 38-39). Other courts have held that use immunity is not sufficient and that complete immunity from prosecution must be afforded. This precise question is now pending before this Court in several cases, and presumably will be resolved at this term. For a recent listing of pertinent cases, see *U. S. ex rel. Catena v. Elias*, 449 F.2d 40 at 48, notes 6 and 9 (dissenting opinion) (C.A. 3d, 1971), stay granted October 12, 1971, 92 S. Ct. 111 (1971).

Since the constitutional sufficiency of use immunity will soon be determined by this Court in other cases, we shall not argue that question at length. Petitioners do firmly submit, however, that use immunity affords protection that is co-extensive with the constitutional privilege, and is fully adequate to satisfy all constitutional requirements. As aptly stated by Mr. Justice White in *Murphy*, "Immunity must be as broad as, but not harmfully and wastefully broader than, the privilege against self-incrimination." (378 U.S. at 107, concurring opinion).

Accordingly, Petitioners respectfully urge this Court to hold that use immunity is constitutionally sufficient to require Morgan to comply with the State Court decree in the present case.

The next question is whether the Federal Courts may permit enforcement of the State Court decree in the present case by adjudicating that Morgan must comply with that decree, but that the State of Mississippi is prohibited from making any use of the required disclosure and its fruits in connection with a criminal proceeding against Morgan. We submit that there can be no real question that the Federal Courts have ample power to so adjudicate.

That is almost precisely the same solution that was adopted in *Murphy*. In *Murphy*, this Court held that when a state witness was called upon to make disclosures that might be incriminating under federal law, the Federal Court would permit the State to compel the disclosure, and would do so by affording a judicially established use immunity and adjudicating that the Federal Government was prohibited from making any use of the compelled testimony and its fruits in a criminal proceeding.

Clearly, the holding in *Murphy* was a judicial declaration and determination designed to accommodate the respective interests of the State and Federal Governments and resolve a problem that resulted from the requirements of the Federal Constitution.

The present case is a particularly appropriate one for the Federal Courts to adjudicate that Morgan must furnish the information required by the State Court decree, but the State shall be prohibited from making any use of the compelled information or its fruits.

As stated above, *Malloy* v. *Hogan* made the Fifth Amendment privilege binding upon the states. Thus it is the Federal Constitution, as construed by the Federal Courts, that entitles Morgan to use immunity. Since it is the Federal Constitution that imposes this requirement on the State courts, it is eminently fitting and proper that the Federal Courts should permit enforcement of the State Court decree by an adjudication that would afford use immunity to Morgan. This result can readily be accomplished by an adjudication of the type outlined above.

Contrary to Morgan's arguments, such a decree would not be an unauthorized exercise of executive or legislative power, but a typical and proper case of a Federal Court adjudicating the applicability, operation, and effect of a Federal constitutional provision.

None of the cases cited by Morgan militates against this solution.

Isaacs v. *United States*, 256 F.2d 654, 661 (C.A. 8, 1958), was decided several years prior to *Murphy* and did not even discuss the question whether a Federal Court could permit enforcement of a State Court decree by adjudicating that the witness should be entitled to use immunity. The case

merely involved the question whether the trial court could grant complete immunity from prosecution.

Likewise, the holding in part 2 of the opinion in *Ellis* v. *United States*, 416 F.2d 791, 796-798 (C.A. D.C., 1969), was based on the premise that a federal statute had confined the power to grant immunity from federal prosecution to a limited group of federal officials that did not include the trial judge. The Court said:

> "... We need not consider what would be the legal situation in the absence of such a statute." (416 F.2d at 796).

Morgan also refers to a footnote in *Uniformed Sanitation Men Association* v. *Commissioner*, 426 F.2d 619, 628 (C.A. 2, 1970). That footnote merely states that the Second Circuit had "no occasion to consider whether we agree with" part 2 of the opinion in *Ellis* v. *United States*, 416 F.2d 791, 796-798.

Petitioners submit, therefore, that Morgan has not cited any authority opposed to the solution urged by Judge Gewin in his dissent in the present case (Pet. App. A, pp. A22-A25).

In *Murphy*, this Court held that an adjudication prohibiting the Federal Government from the use of State compelled testimony or its fruits was amply sufficient to satisfy constitutional requirements. In the present case, in order to accommodate the interests of the State, while at the same time fully preserving Morgan's constitutional rights, the Federal Courts should permit enforcement of the State Court decree by a prohibitory adjudication similar to that made in *Murphy*.

CONCLUSION

For the foregoing reasons, as well as those set forth in the Petition for Certiorari, it is respectfully submitted that a writ of certiorari should issue to review the judgment and opinion of the Fifth Circuit.

Respectfully submitted,

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